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No. 00-593

In the
Supreme Court of the United States

Public Service Commission of Utah, Stephen F. Mecham, Constance B. White, and Clark D. Jones, Commissioners of the Public Service Commission of Utah
PETITIONERS

v.

US West Communications, Inc., MCI Telecommunications Corp., and AT&T Communications of the Mountain States, Inc.
RESPONDENTS

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners submit the following Reply Brief to Respondents' (Qwest Corp.(formally US West Communications, Inc.), AT&T Communications of the Mountain States, Inc., and MCI Worldcom Network and MCIMetro Access Transmission Services, Inc.) Opposition Brief dated January 11, 2001.

Respondents' Statement and argument is intentionally structured to emphasis the role of the *Ex Parte Young* based jurisdictional claim of the federal district court over the individual members of the Public Service Commission of Utah. But the district court not only claimed jurisdiction over the individual commissioners, but also over the State of Utah, through the Public Service Commission of Utah, a state agency. The claimed jurisdiction over the State of Utah is not based on *Ex Parte Young*. It is based on a claimed separate jurisdictional basis; which is the lower courts' aberration of this Court's developing case law concerning state sovereign immunity expressed by this Court's precedents of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)(*Seminole* Tribe), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Brd.*, 527 U.S. 666 (1999)(*College Savings Bank*) and *Kimel v. Florida Brd. of Regents*, 528 U.S. 62 (2000)(*Kimel*). The Respondents' Statement omits disclosure of Qwest Corporation's [Qwest's] refusal before the district court to stipulate that the proceedings before the district court would not be used as a basis for a monetary claim against the State of Utah. As identified by the Petitioners' Reply Brief filed in the District Court, Qwest had made such stipulation precluding any monetary claim against the State in prior district court proceedings,

but refused to do so in this case. Reply Memorandum of Utah Public Service Commission and Individual Commissioners, at 2-4 (D. Utah Filed April 9, 1999).

Contrary to Respondents' tack, the claimed federal court jurisdiction over the State of Utah is not "as a practical matter" the same as claimed jurisdiction over individual commissioners under *Ex Parte Young*. Respondents' Brief in Opposition, at 13, 14. Granting certiorari is needed for this Court to address its intended scope of state sovereign immunity articulated in *Seminole Tribe*, *College Savings Bank* and the other cases. This developed and developing case law was not followed by the Tenth Circuit Court of Appeals. To paraphrase and continue from Respondents' citation of *Hubbard v. United States*, 514 U.S. 695, 721 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor, J. and Souter, J.), "One of the consequences of [denying the writ] is that this Court is deprived of a very important means of assuring that the courts of appeals adhere to its precedents. It is all the more important therefore, that no actual inducements to ignore these precedents be offered to the courts of appeals. But today's decision [to reject the writ would be] just such an inducement; it tells courts of appeals that if they build up a body of case law contrary to ours, their case law will serve as a basis for overruling our precedent. It is difficult to imagine a more topsy-turvy doctrine than this, or one more likely to unsettle established legal rules that the doctrine of stare decisis is designed to protect."

I. The Appellate Court's Cursory Application of *Ex Parte Young* abrogates this Court's efforts to protect state sovereign immunity.

Respondents argue that the Tenth Circuit Court's application of the *Ex Parte Young* doctrine and the result in this case does not warrant a grant of certiorari. The court of appeals decision does not even purport to attempt any effort to examine Congressional intent on the application of *Ex Parte Young* in relation to the Federal Telecommunications Act of 1996 [1996 Act]. *Seminole Tribe, supra,* directs court consideration of Congressional intent for *Ex Parte Young* private party actions against individual state officers, when sought in addition to the enforcement scheme Congress enacted for the statutorily created rights and obligations. 517 U.S., at 73, 74. Understandably, Respondents argue that the remedial scheme for the 1996 Act bears no similarity to the remedial scheme at issue in *Seminole Tribe.* Comparison of the two, however, shows striking parallels. Both follow a detailed scheme of specific, determinative time periods for party negotiation responsibilities, third party intervention to mediate or arbitrate matters upon which the negotiating parties are unable to mutually resolve and a limited role for the federal courts in enforcing the parties' underlying rights and obligations created in the respective statutes.

The 1996 Act does not explicitly or implicitly authorize a private party suit against an individual state officer, the individual commissioners in this

case. The necessary conclusion is that this evidences a lack of Congressional intent for *Ex Parte Young* suits against individual state officers. *Seminole Tribe, supra,* 517 U.S., at 75. Indeed, the 1996 Act can be read to evidence congressional intent that, just as in normal circumstances of mediation or arbitration, where a party is unsatisfied with the mediator's or arbitrator's decision, they may bring suit involving the contracting or negotiating parties, but they do not join the mediator/arbitrator or his employing entity as a party to the litigation.

Respondents rely upon a previously enacted definition of "state commission", 47 U.S. C. § 153(41), to fill this intentional void in the 1996 Act. Respondents' Brief in Opposition, at 18. The definition Respondents rely upon shows that Congress' intent, if any, is for suit against the state, not individual state officers. The definition's full language is: "State Commission. The term 'state commission' means the commission, board or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." (Emphasis added.) As used throughout the 1996 Act, Congress uses "state commission" to identify the regulatory entity which exercises a state's regulatory authority. The statutory language would cover an individual state officer only if state law allowed that individual to exercise state regulatory authority individually; as opposed to being a member of a regulatory board or commission and in conjunction with the other members. Like most states, the State of Utah does not grant any regulatory authority to individual members of the Public Service Commission. The State's regulatory authority can only

be exercised by a quorum of commissioners, acting as the Public Service Commission; not as individuals in either their personal or official capacity. Utah Code § 54-1-3. Just as in *Seminole Tribe,* Congress' language used in the 1996 Act evidences reliance upon actions of the state, rather than acts likely to be performed by an individual state officer (who under Utah state law has no authority to act individually). *Seminole Tribe* represents a significant precedent protecting the sovereign immunity of states and their officers. The 1996 Act implicates special sovereignty interests of the State of Utah. In the underlying proceedings of this case, parties called upon the Public Service Commission to apply state law to resolve their disputes.

II. Respondents' melding of federal court *Ex Parte Young* type jurisdiction over individuals with jurisdiction over a state.

While Respondents are seemingly unable to acknowledge the practical distinction between federal court jurisdiction over individual state officers claimed under *Ex Parte Young* and jurisdiction claimed over the State of Utah, the import of this Court's decisions in *Seminole Tribe, supra, College Savings Bank, supra, Kimel, supra,* and *Alden v. Maine,* 527 U.S.706 (1999), bear upon consideration of the Petition for Writ of Certiorari. The issue raised by the Tenth Circuit Court's decision and the Respondents' argument can be articulated by language from *Kimel.* "Indeed, the . . . refusal to accept the validity and natural import of decisions like *Hans,* rendered over a full century ago by this Court, makes it difficult to engage in

additional meaningful debate on the place of state sovereign immunity in the Constitution. . . . Today we adhere to our holding in *Seminole Tribe*: Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." 528 U. S., at 79, 80.

The Circuit Court's conclusion and the Respondents' effort to cast the State of Utah's options, under the 1996 Act, as a voluntary waiver of immunity consistent with *College Savings Bank* begs for this Court's further direction for the benefit of the lower courts. To characterize the 1996 Act as Congress' gratuity to the states, on condition of their waiver, ignores how Congress structured Section 252. 47 U.S.C. § 252 (e) is the ostensible basis for Congress' cooperative federalism gratuity for the State of Utah to engage in activity which otherwise would not be available to a state. But, Section 252(e) also states "nothing in this section shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an agreement . . ." 47 U.S.C. § 252(e)(3). The result of the Tenth Circuit Court's decision is that establishing or enforcing requirements of State law (as the Utah Public Service Commission was asked to do in the underlying proceedings) is somehow not an otherwise lawful activity for the State of Utah. The perverse choice offered to the State of Utah, retain immunity or be deemed to have voluntarily waived immunity in order to establish or enforce requirements of state law, is not assuaged by recourse to the Federal Trade Commission; to fill in for a state commission where a state declines the so called gratuity and attempts to retain immunity. A state's hope for the Federal Trade

Commission to establish or enforce requirements of state law were dashed when that commission stated that it would not address state law requirements when called upon to function under Section 252 where a state declines. *First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC Docket No. 96-98, 11 FCC Rcd 154999, 1996 FCC LEXIS 4312 (Aug. 8, 1996), ¶1291.

Congress' structure of the 1996 Act's procedure for state commission involvement is the avenue given for enforcement of state law requirements. Congress included no modifier or limitation of what state laws were expected to be enforced in the Section 252 process. 47 U.S.C. § 253 specifically anticipates that the state laws to be enforced would include those pertaining to the states' property interests and protection of public safety and welfare. Whether the establishment and enforcement of these types of laws, pursuant to Constitutional state sovereign powers, is an "otherwise lawful activity" which *College Savings Bank* precludes Congress from withholding from the states, is an important federal question which this Court should address. The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted, January 17, 2001.

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